Harran Transportation Co., Inc. *and* John Cantidate.
Case 29–CA–17884

December 30, 1999

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On July 16, 1999, Administrative Law Judge Margaret M. Kern issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The Respondent filed an answering brief in opposition to the cross-exceptions, and the General Counsel filed a reply brief to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt her recommended Order[2] as modified.

The judge awarded backpay to discriminatee John Cantidate for the entire backpay period from his discharge on December 8, 1993, through November 30, 1995, a reasonable period of time after he had received the Respondent's unconditional offer to reinstate him on November 21, 1995. The Respondent excepts, inter alia, to the gross backpay formula used by the judge for calendar quarters 94–4 (last 8 weeks), 95–1, 95–2, 95–3, and 95–4. The Respondent argues that Cantidate is due less gross backpay than what was found by the judge. We agree that the judge miscalculated Cantidate's gross backpay for that portion of the backpay period. For the reasons stated below, we shall modify the judge's recommended Order.

Before his discharge in 1993, Cantidate worked as a tier 1 coach busdriver for the Respondent. In that job, he made Atlantic City runs at a flat rate of $150, airport runs at an hourly rate of $8, combination Atlantic City/airport runs at a flat rate of $135, and a few charter runs which paid between $80 and $130 per trip. There is no dispute that Cantidate's average weekly earnings, exclusive of any tip income, in 1993 amounted to $901.62.

To compute Cantidate's weekly gross backpay for calendar quarters 93–4, 94–1, 94–2, and 94–3 and the first 5 weeks of quarter 94–4, the judge applied the backpay formula submitted by the General Counsel. Under this formula, the judge used $901.62, the 1993 average weekly earnings, as a baseline and added to that figure the $180 per week in tip income received by Cantidate. She reached a total weekly amount of $1,081.62. She then multiplied $1,081.62 by the appropriate number of weeks in each quarter to find that Cantidate was entitled to gross backpay for quarters 93–4, 94–1, 94–2, and 94–3 in the amounts listed in our Appendix A, which is attached to this Supplemental Decision, and $5,408.10 representing the first 5 weeks of quarter 94–4. We adopt these findings.

For the remaining portion of the backpay period, the judge rejected the General Counsel's backpay formula. She agreed with the Respondent that the General Counsel's formula failed to reflect the changes in the wage rates for tier 1 drivers made by the Respondent on November 1, 1994, and later on May 1, 1995. The credited evidence shows that on November 1, 1994, the Respondent lowered its wage rates for tier 1 drivers from $150 to $95 for the Atlantic City runs and from $135 to $94 for the combination Atlantic City/airport runs. The credited evidence further shows that on May 1, 1995, the Respondent increased the Atlantic City run rate from $95 to $99 and the combination Atlantic City/airport run rate from $94 to $100. The judge also found that the Respondent provided an extra $30 meal allowance to tier 1 drivers for both the Atlantic City and the combination Atlantic City/airport runs effective November 1, 1994. To summarize, from November 1, 1994, until May 1, 1995, tier 1 drivers received a total (including their meal allowances) of $125 for the Atlantic City runs and $124 for the combination Atlantic City/airport runs, respectively. Starting May 1, 1995, tier 1 drivers received a total (including their meal allowances) of $129 for the Atlantic City runs and $130 for the combination Atlantic City/airport runs, respectively.

The judge attempted to devise a backpay formula to account for these wage changes. First, she computed Cantidate's weekly gross backpay starting November 1, 1994, on the basis of a 50/50 split between the Atlantic City runs and the combination Atlantic City/airport runs.[3] She then averaged the $125 Atlantic City total rate with

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel excepts to that portion of the judge's recommended Order that directs the General Counsel to furnish a copy of the instant Supplemental Decision to the Internal Revenue Service. We find merit in this exception. As set forth in *Original Oyster House*, 281 NLRB 1153 fn. 1 (1986), enfd. 822 F.2d 412 (3d Cir. 1987), the Board, not the General Counsel, has the notification responsibility in these circumstances. Accordingly, we shall delete the reference to the General Counsel in the judge's recommended Order, and we shall furnish a copy of the Supplemental Decision to the Internal Revenue Service.

[3] The Respondent's records show that Cantidate essentially evenly divided his worktime between the Atlantic City runs and the combination Atlantic City/airport runs in 1993 and that he did very few airport and charter runs during that year. For ease of computing gross backpay for the period between November 1, 1994, and November 30, 1995, the Respondent urged that Cantidate's workweek be treated as if it were comprised of only the Atlantic City runs and combination Atlantic City/airport runs. The judge found, and we agree, that this approach is acceptable.

the $124 combination Atlantic City/airport run total rate to obtain "an average rate of $124.50 per day." Using a 7-day workweek, the judge multiplied the $124.50 average daily rate by 7 to obtain average weekly earnings (without tips) of $871.50. Finally, she added Cantidate's $180 weekly tip income to $871.50 for a new weekly total amount of $1,051.50. Thus, according to the judge's calculations, Cantidate would have earned about $30 less per week in gross backpay after the November 1, 1994 changes than he did in 1993.

Using this same approach, the judge calculated a new weekly gross backpay amount to reflect the May 1, 1995 wage changes. She again used the concept of a 50/50 split between the Atlantic City runs and the combination Atlantic City/airport runs. She averaged the $129 Atlantic City total rate with the $130 combination Atlantic City/airport total rate to obtain "an average rate of $129.50 per day." Once again, using a 7-day workweek, she multiplied the $129.50 average daily rate by 7 to obtain average weekly earnings (without tips) of $906.50. Finally, she added Cantidate's $180 weekly tip income to $906.50 for a new weekly total amount of $1,086.50. Thus, according to the judge's calculations, Cantidate would have earned almost $5 more per week in gross backpay after the May 1, 1995 wage changes than he did in 1993.

We find that the judge erred in calculating the impact of the November 1, 1994 and May 1, 1995 wage changes. The judge's reasoning is flawed because her formula is based on the premise that Cantidate would have worked 7 days a week during the entire 13-month period when the wage changes were in effect. This is not consistent with Cantidate's testimony that he worked "6 or 7 days" per week before his discharge and the Respondent's documents that indicate less than a 7-day-a-week work schedule for Cantidate in 1993. Thus, we find that the judge's backpay formula for quarters 94-4 (last 8 weeks), 95–1, 95–2, 95–3, and 95–4 does not reasonably approximate what Cantidate would have earned had he not been discriminatorily discharged. See *La Favorita, Inc*., 313 NLRB 902 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). Therefore, we do not adopt the amounts of gross backpay based on the judge's formula that are listed for these quarters in the appendix attached to her supplemental decision.

To calculate Cantidate's gross backpay for the period after November 1, 1994, we begin with the figure for the 1993 average weekly earnings of $901.62 that has already been established as a baseline for the backpay period preceding November 1, 1994. Accepting the Respondent's assumption of a 50/50 split between the number of Atlantic City runs and the combination Atlantic City/airport runs, we find that 53 percent of the $901.62 (or $477.86) was derived from Atlantic City trips and 47 percent of the $901.62 (or $423.76) was derived from the combination Atlantic City/airport trips. As of November 1, 1994, the rate for the Atlantic City run was reduced from $150 to $125. This was a decrease of 16.67 percent per individual trip. The rate for the combination Atlantic City/airport run was reduced from $135 to $124. This was a decrease of 8.15 percent per individual trip. Taking the baseline weekly pay allotted for the Atlantic City trips ($477.86) and applying the decrease of 16.67 percent per individual trip results in a new weekly pay for Atlantic City trips of $398.20. Similarly, taking the baseline weekly pay allotted for the combination Atlantic City/airport trips ($423.76) and applying the decrease of 8.15 percent per individual trip results in a new weekly pay for the combination Atlantic City/airport trips of $389.22. Thus, the average weekly earnings (exclusive of tip income) effective November 1, 1994, is $787.42 ($398.20 plus $389.22). We then add to $787.42 the $180 per week in tip income received by Cantidate to reach a total weekly amount of $967.42. Multiplying $967.42 by the appropriate number of weeks in each quarter, we find that Cantidate is entitled to gross backpay for the period of November 1, 1994, to May 1, 1995, in the amounts listed below.

Yr./Qtr.	Weeks	Average Weekly Earnings	Gross Backpay
94-4	8	$967.42	$7,739.36
95-1	13	967.42	12,576.46
95-2	5	967.42	4,837.10

With the May 1, 1995 changes, we continue to assume that 53 percent of Cantidate's weekly work would have been related to Atlantic City trips and 47 percent of his weekly work would have been related to the combination Atlantic City/airport trips. The May 1995 rate for the Atlantic City run was slightly increased to $129 per run from the November 1994 rate of $125, but was still lower than the 1993 rate of $150. The May 1995 individual trip rate was 14 percent less than the 1993 rate. The May 1995 rate for the combination Atlantic City/airport run was increased to $130 per run from the November 1994 rate of $124, but it was still lower than the 1993 rate of $135. The May 1995 individual trip rate was 3.70 percent less than the 1993 rate. Taking the baseline weekly pay allotted for the Atlantic City trips ($477.86) and applying the decrease of 14 percent per individual trip results in a new weekly pay for Atlantic City trips of $410.96. Similarly, taking the baseline weekly pay allotted for the combination Atlantic City/airport trips ($423.76) and applying the decrease of 3.70 percent per individual trip results in a new weekly pay for the combination Atlantic City/airport trips of $408.08. Thus, average weekly earnings (exclusive of tip income) effective May 1, 1995, total $831.84 ($423.76 plus $408.08). We then add to $831.84 the $180 per week in tip income received by Cantidate to reach a total weekly amount of $1,011.84. Multiplying

$1,011.84 by the appropriate number of weeks in each quarter, we find that Cantidate is entitled to gross backpay for the period of May 1 through November 30, 1995, in the amounts listed below.

Yr./Qtr.	Weeks	Average Weekly Earnings	Gross Backpay
95-2	8	$1,011.84	$8,094.72
95-3	13	1,011.84	13,153.92
95-4	9	1,011.84	9,106.56

Thus, based on our above revised calculations for the last five quarters of the backpay period, we conclude that Cantidate is owed total gross backpay in the amount of $52,691.54, as indicated in the attached appendix A.

ORDER

The National Labor Relations Board orders that the Respondent, Harran Transportation Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns shall pay John Cantidate the sum of $52,691.54, plus interest, less the tax withholdings required by Federal and state law, computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

APPENDIX A

Yr./Qtr.	Gross Backpay	Interim Earnings	Interim Expenses	Net Interim Earnings	Net Backpay
93-4	$ 3,893.83	-	-	-	$ 3,893.83
94-1	14,061.06	-	-	-	14,061.06
94-2	12,330.46	$ 3,340.36	$ 133.92	$ 3,206.44	9,124.02
94-3	11,789.66	7,838.62	435.24	7,403.38	4,386.28
94-4	13,147.46	8,396.26	435.24	7,961.02	5,186.44
95-1	12,576.46	8,591.79	435.24	8,156.55	4,419.91
95-2	12,931.82	9,462.22	435.24	9,026.98	3,904.84
95-3	13,153.92	7,145.88	435.24	6,710.64	6,443.28
95-4	9,106.56	8,136.00	301.32	7,834.68	1,271.88
Total	$102,991.23	$52,911.13	$2,611.44	$50,299.69	$52,691.54

Kathy Drew King, Esq., for the General Counsel.
John Diviney, Esq. and *Alan Pearl, Esq.,* for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This supplemental proceeding was heard in Brooklyn, New York, on April 21 and 22, 1999. A backpay specification and notice of hearing was issued on January 21, 1999, predicated on a Decision and Order of the Board dated October 30, 1995 (319 NLRB 461), which directed Harran Transportation Co., Inc. (Respondent) to take certain affirmative action, including offering full reinstatement and making whole John Cantidate for any loss of earnings he may have suffered as a result of Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

General Principles

The purpose of a backpay award is to make whole the employee who has been discriminated against as the result of an unfair labor practice. The employee is entitled to receive what he would have earned normally during the period of the discrimination against him, less what he actually earned in other employment during that period. An employee must use reasonable diligence to find employment during the period of discrimination, and is not entitled to backpay for periods during which he voluntarily remained idle. *NLRB v. Brown & Root, Inc.,* 311 F.2d 447 (8th Cir. 1963).

The finding of an unfair labor practice is presumptive proof that some backpay is owed and in a backpay proceeding, the sole burden on the General Counsel is to show the gross amounts of backpay due, that is, the amount the employee would have received but for the employer's illegal conduct. Once that is established, the burden is upon the employer to establish facts that would mitigate that liability. *Atlantic Limousine, Inc.*, 328 NLRB 257 (1999). The backpay claimant should receive the benefit of any doubt rather than Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. *La Favorita, Inc.,* 313 NLRB 902, 903 (1994).

FINDINGS OF FACT

Cantidate was employed by Respondent as a full-time, tier 1 coach busdriver from January 3, 1984, until the time of his unlawful discharge on December 8, 1993. Although Cantidate was required to work only four shifts per week, he regularly invoked his seniority rights and worked seven shifts per week, 17 hours per shift. Each day, Cantidate drove from his residence to Respondent's facility in West Babylon, New York. If he was scheduled to do a line run to Atlantic City, he drove across Long Island, picking up passengers on his way, and drove them to Atlantic City. He waited there for 6 hours and then drove the same individuals back to Long Island. For this round trip Atlantic City run, Cantidate was paid a flat rate of $150. At times, there were not enough passengers to have all of Respondent's buses drive to Atlantic City. In that case, the buses met in Queens and passengers were merged. If Cantidate merged his passenger complement and was not a driver selected to continue on to Atlantic City, he drove airport runs for the rest of the day until the Atlantic City bus returned to Queens. When the Atlantic City bus returned, Cantidate drove the reverse route along Long Island dropping off passengers. For this combination Atlantic City/airport run Cantidate was paid a flat rate of $135. Cantidate testified that on rare occasion he spent an entire day driving only to the airports for which he was paid at an hourly rate of $8 per hour and the shift lasted 8 to 10 hours. On a few occasions he drove charter runs for which he was paid a percentage of the customer price which ranged roughly between $80 and $130 per trip. Cantidate testified that 99 percent of the time he drove Atlantic City runs.

Cantidate testified that on Atlantic City runs he transported approximately 49 passengers and earned approximately $30 in tips for each round trip. At times passengers tipped him individually and at other times passengers took up a tip collection. Cantidate did not keep records of his tip income and did not report this income on his state or Federal tax returns. Nor did he advise the Family Court of Nassau County of his tip income in the course of a child support proceeding. His estimate that he received an average of $180 per week in tips is based solely on his uncorroborated recollection. Herman Lightfoot, a tier 1 driver employed by Respondent for 30 years, testified that when he drove line runs in 1993, he received minimal tips, averaging about $5 to $10 per day. On some days he did not receive any tips. He never recalled passengers on the Atlantic City line run taking up a tip collection on his behalf. Joseph Fernandez is presently an accounting consultant to Respondent and formerly Respondent's vice president and chief financial officer. Fernandez testified that from time to time he heard line drivers complain that they didn't receive tips.

Following his discharge, Cantidate testified that he searched for work as a busdriver. He looked on a daily basis at employment ads in Newsday, The New York Daily News, and The Chief, three widely circulated newspapers. He called and/or filed applications with approximately 20 bus and coach companies. He checked in with the Amalgamated Transit Union approximately once a week. He applied for a job with the U.S. Postal Service, United Parcel Service, and took a civil service examination to become a police officer. Once a week he went to the New York State Unemployment Office and searched the bulletin boards and computer listings for work opportunities. He looked for job opportunities as a busdriver but indicated a willingness to take any available position.

On or about January 11, 1994, Cantidate applied for a busdriver position with the Metropolitan Transit Authority Long Island Bus Company (MTA) located in Uniondale, New York. He was interviewed and placed on a call list for part time work as full-time work was not available. He underwent several weeks of training in January and began working part-time on or about May 25, 1994. On June 19, 1994, he was converted to full-time status. From January to June 1994, Cantidate continued to search for full-time employment. Cantidate regularly works five shifts per week at the MTA. He has requested to work as many overtime hours as possible but overtime opportunities have been limited because of his lower seniority level. Cantidate does not earn tips driving for the MTA.

Cantidate testified that since 1990 he has lived continuously at 2 Satinwood Street in Central Islip, New York, and that he drove 18 miles each way to get to Respondent's facility in West Babylon. During his employment for the MTA, Cantidate testified he has driven 36 miles each way to the MTA facility in Uniondale. Notwithstanding this testimony, however, a review of Cantidate's tax returns reveals that in 1993, he reported a home address in Hollis, Queens, in 1994, he reported a home address in Uniondale, and in 1995 he reported the 2 Satinwood

Street address. Cantidate explained that the Hollis address was the home of a friend and that he listed that address because he was in the process of a divorce and his wife was taking his mail. He further explained that the Uniondale address was the home of his parents. He was unequivocal in his testimony that although he listed these addresses for various reasons, he continuously resided at 2 Satinwood Street.

George Semke, Respondent's president, testified, without contradiction, that on November 1, 1994, Respondent reduced its wage rates for tier 1 drivers as follows: for Atlantic City runs, the shift rate was reduced from $150 to $95; for Atlantic City/airport combination runs, the shift rate was reduced from $135 to $94; and for airport work, the hourly rate was reduced from $8 to $5.50. Effective that same date, Respondent instituted a meal allowance of $30 per day for tier 1 drivers doing the Atlantic City run. He was not certain if the meal allowance was given for combination runs but it was given for hourly airport work depending upon the number of hours the driver was away from the bus depot. On May 1, 1995, Respondent increased its wage rates for tier 1 drivers as follows: for Atlantic City runs, the shift rate was increased from $95. to $99; for Atlantic City/airport combination runs, the shift rate was increased from $94 to $100; and for airport work, the hourly rate was increased from $5.50 to $5.85. Semke further testified that from June 20 to July 15, 1994, Respondent's operation was shut down due to a work stoppage and no employees worked during that period.

By letter dated November 21, 1995, Respondent made an unconditional offer to Cantidate to return to work. The General Counsel alleges that the backpay period terminated on November 30, 1995, a reasonable period of time after Cantidate received the offer of reinstatement.

The General Counsel submits that the appropriate calculation of gross backpay in this matter is Cantidate's average weekly earnings for the 48 weeks he worked in 1993. The parties stipulated that Cantidate's social security wages for 1993 was $44,986.59. Richard Epifanio, supervisory compliance officer, testified that he subtracted from that amount an accrued vacation benefit of $1,708.64 for an adjusted amount of $43,277.95. He then divided that figure by the 48 weeks worked and determined an average weekly earning of $901.62.

Analysis

A. Gross Backpay

The General Counsel's office has the burden of establishing gross backpay by seeking to ascertain the probable earnings of a discriminatee during the backpay period. These are earnings which would have been paid had the employee not been unlawfully discharged. The Board is only required to employ a formula reasonably designed to produce approximate awards due. *NLRB v. Pilot Freight Carriers, Inc.*, 604 F.2d 375, 378–379 (5th Cir. 1979).

Respondent does not challenge that Cantidate's average weekly earnings in 1993 was $901.62.[1] Respondent does challenge the inclusion in any gross backpay figure of tip income on the grounds that Cantidate never previously reported this income and that his estimate of tip income is exaggerated given the testimony of a currently employed driver that tip income for line drivers was minimal. I credit Cantidate's testimony as to the amount of tips he earned. Cantidate was a credible witness and his testimony appeals to common sense. He was driving large motor coach buses to Atlantic City and he transported approximately 49 passengers each day or 343 passengers each week. If each of those passengers gave Cantidate a tip of between 50 cents and $1, he would easily have earned the estimated $180 in tips each week. I find the figure of $180 to be a reasonable approximation of Cantidate's weekly tip income, and his failure to previously report this income to government authorities is not fatal to his claim. *Atlantic Limousine, Inc.,* 328 NLRB 257 (1999); *Hacienda Hotel & Casino*, 279 NLRB 601 (1986). It is, however, appropriate for the General Counsel to notify the Internal Revenue Service of this unreported income. Id. at 601 fn.4.

Respondent further contends that if Cantidate had not been unlawfully discharged, he would have suffered a 5-percent loss of income for the first 13 weeks of 1994. Respondent's argument is that a traffic accident that Cantidate had on December 5, 1993, which Judge Edelman found in the underlying case to be one of the pretextual reasons given for Cantidate's unlawful discharge, was nevertheless a "chargeable accident" which would have led to forfeiture of his safety bonus. Respondent's argument is pure speculation. Respondent should not now be heard to say that, on reflection, it would like to exercise its option to take presumably lawful disciplinary action when it failed to take such action in the first place. Moreover, Judge Edelman addressed Respondent's treatment of driver accidents at length in his decision, and there was no discussion of a safety bonus being forfeited with respect to any driver.

Respondent correctly challenges the General Counsel's gross backpay calculations for the second and third quarters of 1994 in light of the uncontradicted testimony of Respondent's president that from June 20 to July 15, 1994, there was a shutdown of Respondent's operation during which no employees worked. It is therefore proper to deduct 1.6 weeks of gross wages for the second quarter of 1994 and 2.1 weeks for the third quarter of 1994. The gross backpay for the second quarter of 1994 is $12,330.46 ($14,061.06 – (1.6 x $1,081.62)). The gross backpay for the third quarter of 1994 is $11,789.66 ($14,061.06 – (2.1 x $1,081.62)).

Respondent correctly challenges the General Counsel's gross backpay calculations for the fourth quarter of 1994 and for all of 1995 in light of the uncontradicted testimony of Respondent's president that wage reductions and increases were effected during this period of time. Semke testified, and I find, that on November 1, 1994, Respondent reduced its wage rates for tier 1 drivers from $150 to $95 for Atlantic City runs and from $135 to $94 for combination runs. I further find that effective the same date, Respondent instituted a meal allowance of $30 per day for Atlantic City runs.[2] Semke testified that he was not certain if the meal allowance was given for combination runs. Since any uncertainty in the evidence is to be resolved against Respondent as the wrongdoer, *Paper Moon Milano*, 318

[1] Respondent did seek to introduce evidence that the discriminatee received medical and pension benefits at the MTA which he did not receive from Respondent. I adhere to my ruling excluding this evidence as relating to collateral benefits which are not a proper offset to gross backpay in the circumstances of this case. See *United States Can Co.*, 328 NLRB 334 (1999).

[2] There was some testimony regarding the nontaxable nature of the meal allowance. I make no finding in this regard other than to find that the meal allowance is appropriately considered as part of the gross backpay figure.

NLRB 962, 963 (1995), I find that the meal allowance should be credited to the gross backpay figure for combination runs as well as Atlantic City runs. The effective wage rate for combination runs as of November 1, 1994, was therefore $124 and for Atlantic City runs was $125.

An examination of Respondent's records for 1993 reveals that Cantidate drove Atlantic City runs 140 days out of a total of 288 days, or 49 percent of the time. The balance of his trips were combination runs. Respondent suggests in its brief for ease of computation that Cantidate's backpay should be computed on the basis of a 50/50 split, half his time calculated on the Atlantic City run rate ($125 per day), and half his time calculated at the combination run rate ($124 per day). I adopt Respondent's approach as fair and reasonable. Effective November 1, 1994, therefore, I conclude that the gross backpay figure should be computed at an average rate of $124.50 per day for a 7-day workweek. The gross backpay for the fourth quarter of 1994, including tips, is therefore $5,408.10 (5 weeks x $1,081.62) plus $841.20 (8 weeks x $1,051.50) totaling $13,820.10.

The gross backpay for the first quarter of 1995 is $13,669.50 (13 weeks x $1,051.50).

In the second quarter of 1995, effective May 1, 1995, Respondent increased the Atlantic City run rate from $95 to $99 while continuing the $30 meal allowance for an effective rate of $129 per day. The combination run rate was increased from $94 to $100, for an effective rate of $130 per day. For this period, I conclude that the gross backpay figure should be computed at an average rate of $129.50 per day for a 7-day workweek. The gross backpay for the second quarter of 1995, including tips, is therefore $5,257.50 (5 weeks x $1,051.50) plus $8692 (8 weeks x $1086.50) totaling $13,949.50.

The gross backpay for the third quarter of 1995 is $14,124.50 (13 weeks x $1,086.50).

I find that the backpay period terminated on November 30, 1995, as alleged by the General Counsel. The gross backpay period for the fourth quarter of 1995 is therefore $9778.50 (9 weeks x $1086.50).

The total gross backpay owed to Cantidate for Respondent is $107,417.11.

B. Interim Earnings

Respondent's sole challenge to the General Counsel's interim earnings calculation is that Cantidate failed to adequately search for interim employment in the fourth quarter of 1993 and the first and second quarters of 1994. I reject Respondent's challenge as contrary to the credible evidence.

Cantidate credibly testified as to his daily efforts to find work during the entire backpay period. After he was placed on an on-call list by the MTA in January 1994, he nevertheless continued to look for full time work and the record shows that from January to June 1994, prior to his beginning to work full time for the MTA, Cantidate made no less than 30 attempts to find work.[3] Respondent's introduction of classified advertisements from Newsday is not sufficient to prove that there were jobs available or that Cantidate would have been successful in obtaining one. *E & L Plastics Corp.*, 314 NLRB 1056, 1058 (1994).

In determining whether an individual claimant has made a reasonable search for employment, the test is whether the record as a whole establishes the employee diligently sought other employment during the entire backpay period. Respondent must affirmatively demonstrate that the employee neglected to make reasonable efforts to find interim work. The employer fails to meet the burden by merely presenting evidence of lack of employee success in obtaining interim employment. The discriminatee is held only to reasonable exertions in this regard, not the highest standard of diligence. *Rainbow Coaches*, 280 NLRB 166, 180 (1986). Applying this standard to the instant case, I find that Cantidate made a reasonable search for work during the entire backpay period and there was no failure on his part to mitigate his damages. I therefore adopt the General Counsel's calculation of interim earnings for the entire backpay period.

C. Mileage Expenses

I credit Cantidate's testimony that since 1990 he has resided continuously in Central Islip, New York. I therefore find that during his employment with Respondent, Cantidate drove 36 miles each day for a 7-day workweek, or 252 miles per week. During his employment with the MTA, Cantidate drove 72 miles each day for a 5-day workweek, or 360 miles per week. Cantidate should therefore be reimbursed for the 108 miles driven each week in excess of the mileage he drove when employed by Respondent.[4]

It is not clear from the record how many trips to work Cantidate made between May 25, 1994, when he began working part time for the MTA and June 19, 1994, when he began working full time, 5 days per week. The General Counsel calculated 9 weeks of mileage expenses for the second quarter of 1994 which is far in excess of the appropriate amount. Respondent, however, did not adduce any evidence to clarify this point. I therefore find it reasonable to accord the discriminatee 4 weeks of mileage expenses in the second quarter of 1994, 2 weeks for the period May 25 to June 19, and 2 weeks for the last 2 weeks in June.

Since the backpay period ended on November 30, 1994, the discriminatee is entitled to 9 weeks of mileage expenses in the fourth quarter of 1995.

Respondent's final argument against the awarding of mileage expenses to the discriminatee is that because Cantidate had meal and uniform expenses while working for Respondent which he does not have working for the MTA, he had overall less expenses during the backpay period. Respondent argues that any award of mileage expenses would therefore constitute a bonus. Respondent's argument is plainly without merit. The Board has consistently held that transportation expenses to and from interim employment which exceed the normal costs of transportation to and from the respondent's place of business are properly deductible from interim earnings. *Richard W. Kaase Co.*, 162 NLRB 1320, 1326 (1967). There is no basis to offset the amount of that deduction with other savings potentially realized by the discriminatee in the course of his interim employment. I find that the discriminatee is entitled to the full

[3] Respondent subpoenaed an MTA official to appear at the hearing and to produce records relating to this proceeding. No evidence was offered that Cantidate ever refused to work available hours at the MTA between January and June 1994

[4] Respondent is being charged for the seven shifts that Cantidate worked each week as part of the gross backpay calculation. It is therefore fair and reasonable to use the same seven shifts to calculate the mileage driven by Cantidate as opposed to the five shifts used by the General Counsel.

deduction from his interim earnings for excess mileage expenses.

Conclusion

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Harran Transportation Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

Pay to John Cantidate the sum of $57,117.42 as net backpay, with interest computed thereon in the manner prescribed in the Board's Decision and Order and making the appropriate deductions from said amounts of any tax withholding required by state and Federal laws.

The General Counsel shall

Furnish a copy of this Supplemental Decision and Order to the Internal Revenue Service